Supreme Court, U.S.
FILED
FEB 13 2002
CLERK

No. 01-722

In the Supreme Court of the United States

PHOTOGRAMMETRIC DATA SERVICES, INC., AND DAVID G. WEBB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal mail fraud statute, 18 U.S.C. 1341, encompasses intrastate deliveries by private or commercial interstate carriers.

2. Whether application of the mail fraud statute to such deliveries is a valid exercise of Congress's authority under the Commerce Clause.

3. Whether, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the district court was required to determine petitioners' sentences under the Sentencing Guidelines based solely on facts that were found by the jury beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 259 F.3d 229. The opinion of the district court (Pet. App. 52a-74a) is reported at 103 F. Supp. 2d 875.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2001. The petition for a writ of certiorari was filed on October 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Photogrammetric Data Services, Inc. (PDS) and David Webb were found guilty of two counts of highway project fraud, in violation of 18 U.S.C. 1020, and three counts of mail fraud, in violation of 18 U.S.C. 1341. The district court sentenced PDS to concurrent terms of one year's probation and a fine of $522,045.29 on each count of conviction. The district court sentenced Webb to concurrent terms of 24 months' imprisonment, to be followed by two years of supervised release, on each count of conviction. The district court also ordered both PDS and Webb to pay restitution in the amount of $435,038.33. The court of appeals affirmed. Pet. App. 1a-51a.

1. Petitioner PDS, a Virginia corporation that prepared topographic maps from aerial photography and ground surveys, performed subcontracting work for firms having contracts with the Virginia Department of Transportation (VDOT) to complete the preliminary engineering work for highway construction projects. Pet. App. 3a. Petitioner Webb was a managerial employee of PDS, responsible for the billing on the VDOT jobs. *Ibid.* Between 1994 and 1999, petitioners engaged in a scheme to defraud VDOT by submitting inflated invoices to VDOT's prime contractors, who in turn submitted the invoices to VDOT. *Ibid.* Through that fraudulent scheme, PDS "increased the billed amounts on almost every VDOT job by approximately ten to fifteen percent, resulting in overbilling of approximately $100,000 to $200,000 per year for five years." *Id.* at 4a. The fraudulent invoices were sent from PDS's offices in Virginia to VDOT's prime

contractors in Virginia through either the United States Postal Service or the United Parcel Service (UPS), a commercial interstate carrier. *Id.* at 23a-24a.[1]

2. Petitioners were indicted in the United States District Court for the Eastern District of Virginia on four counts of making false statements about the quantity and cost of the work performed in connection with the construction of a highway project, in violation of 18 U.S.C. 1020 (Counts 1-4); and four counts of using the mail and other interstate commercial carriers in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 (Counts 5-8). At the close of the government's case, the district court granted a motion for judgment of acquittal on Counts 2 and 6. The jury found each petitioner guilty of two counts of highway project fraud (Counts 1 and 3) and three counts of mail fraud (Counts 5, 7, 8). The jury found petitioners not guilty of the remaining count of highway project fraud (Count 4). Pet. App. 53a-54a.

The district court denied petitioners' post-verdict motions for a judgment of acquittal or a new trial. Pet. App. 52a-74a. The court rejected petitioners' argument that 18 U.S.C. 1341 does not apply to intrastate deliveries by interstate commercial carriers. As amended in 1994, Section 1341 establishes criminal penalties for any person who, in furtherance of a fraudulent scheme, "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or

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[1] "Although the government was unable to present evidence as to which carrier was used for any particular invoice or that any particular invoice actually crossed state lines in route from PDS to the prime contractor, it did successfully prove that one of these interstate carriers (the Postal Service or UPS) was always used to execute the fraudulent overbilling scheme." Pet. App. 24a.

delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Based on the text of the statute, the district court was "confident that Congress intended the amendments to 18 U.S.C. § 1341 to extend to purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries." Pet. App. 65a. The court further explained that, under the Commerce Clause, Congress may regulate the intrastate activities of private or commercial carriers "because they are instrumentalities of interstate commerce." *Id.* at 66a.

At sentencing, petitioners were assigned a base offense level of 6 pursuant to Sentencing Guidelines § 2F1.1 (1998) (now deleted and combined with Guidelines § 2B1.1). Although the total loss amount for the invoices identified in the five counts of conviction was approximately $20,000,[2] the district court estimated the loss amount resulting from the entire fraudulent scheme to be $435,038.33, which corresponded to a nine-level increase in the offense level. See Guidelines § 2F1.1(b)(1)(J) (1998). The district court also imposed a two-level increase because the offense involved more than minimal planning. See Guidelines § 2F1.1(b)(2)(A) (1998). Those increases resulted in an adjusted offense

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[2] Petitioners use $19,008 (Pet. 3) as the total loss figure for the five invoices identified in the counts of conviction. That figure, however, is based on the testimony of a government agent before the grand jury, which petitioners reviewed with the agent at trial. The trial testimony covered some additional false entries on time sheets supporting the same five invoices. As a result, the loss figure based on the trial testimony ($21,852.58) is higher than the figure based upon the grand jury testimony. See Gov't C.A. Br. 39 & n.11.

level of 17. The district court sentenced Webb to concurrent terms of 24 months' imprisonment, to be followed by two years' supervised release, on each count of conviction. PDS was sentenced to one year's probation and ordered to pay a fine of $522,045.29. Both petitioners were ordered jointly to make restitution in the amount of $435,038.33. Pet. App. 42a; Gov't C.A. Br. 46 n.16.

3. The court of appeals affirmed. Pet. App. 1a-51a. The court rejected petitioners' argument that intrastate deliveries by a commercial interstate carrier fall outside the scope of the mail fraud statute. *Id.* at 24a-28a. The court found that "the unambiguous language of current § 1341 criminalizes all mailings in furtherance of a fraudulent scheme if the mailings are placed with either the United States Postal Service or with other private or commercial mail delivery services which operate interstate, regardless of whether any particular mailing actually crosses state lines." *Id.* at 26a. The court also observed that before 1994, when the reach of the mail fraud statute was limited to use of the United States Postal Service, the statute made no distinction between intrastate and interstate mailings. *Id.* at 25a. Because "Congress elected to use virtually identical language as that dealing with the use of the United States mail" when it broadened the statute to encompass private or commercial interstate carriers, *id.* at 26a, the court found it "obvious that Congress intended to prohibit the use of private and commercial interstate carriers to further fraudulent activity in the same way such use of the United States mail had long been prohibited," *id.* at 27a.

The court of appeals further held that the mail fraud statute, as applied to intrastate deliveries by private or commercial interstate carriers, is a permissible exercise

of Congress's Commerce Clause power. Pet. App. 28a-35a. The court explained that, under the Commerce Clause, Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that has a substantial effect on interstate commerce. *Id.* at 29a. The court concluded that "[p]rivate and commercial interstate carriers are facilities or instrumentalities of interstate commerce, which Congress can regulate and protect from harm, 'even though the [particular] threat may come only from [an] intrastate activity.'" *Ibid.* (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)).

The court of appeals also rejected petitioners' argument that their rights under the Due Process Clause were violated because their sentences were based on a total loss amount found by the sentencing judge by the preponderance of the evidence. Pet. App. 42a-47a. The court held that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), did not deprive a district court of the authority to determine facts that serve to increase a defendant's sentence within the range authorized by statute. Pet. App. 43a-46a. The court also held that the instant case was not an "extraordinary" one in which a sentencing factor exerts "so great or disproportionate" an effect on the sentence that it becomes a "tail which wags the dog of the substantive offense." *Id.* at 46a (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)).

Judge Williams filed an opinion concurring in part and concurring in the judgment. Pet. App. 48a-51a. Judge Williams concluded that application of the mail fraud statute to intrastate use of a private or commercial interstate carrier is more appropriately sustained as regulation of an activity that substantially affects interstate commerce than as regulation of the "instrumentalities" of interstate commerce. *Id.* at 51a.

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the mail fraud statute is inapplicable to intrastate deliveries by private or commercial interstate carriers. As the court of appeals correctly recognized (Pet. App. 26a), that claim is contrary to the "unambiguous language" of the statute, which encompasses "any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." 18 U.S.C. 1341. The statute does not require that the matter be "sent or delivered" across state lines. Although petitioners suggest (Pet. 6) that the scope of the statute is unclear because Congress did not insert the phrase "including intrastate deliveries" after the phrase "interstate carrier," the absence of such superfluous terms does not affect the statute's clarity. Cf. *Burns* v. *United States*, 501 U.S. 129, 136 (1991) ("In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective.").

The history and structure of the mail fraud statute further support the court of appeals' interpretation. Before 1994, Section 1341 applied only to the use of the United States Postal Service, but the statute clearly encompassed both intrastate and interstate mailings. See, *e.g.*, Pet. App. 25a; *United States* v. *Lefkowitz*, 125 F.3d 608, 617 (8th Cir. 1997), cert. denied, 523 U.S. 1079 (1998); *United States* v. *Elliott*, 89 F.3d 1360, 1364 (8th Cir. 1996), cert. denied, 519 U.S. 1118 (1997). In 1994, Congress amended the statute to cover the use of private or commercial interstate carriers in the execution of fraudulent schemes. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322,

§ 250006, 108 Stat. 2087. In so doing, "Congress elected to use virtually identical language as that dealing with the use of the United States mail." Pet. App. 26a. Thus, the amended statute imposes criminal liability on an individual who "places in any post office or authorized depository for mail matter, any matter or thing whatever *to be sent or delivered by the Postal Service*, or deposits or causes to be deposited any matter or thing whatever *to be sent or delivered by any private or commercial interstate carrier*." 18 U.S.C. 1341 (emphasis added). Congress's use of parallel language in extending the coverage of Section 1341 to private or commercial interstate carriers demonstrates that it "intended to prohibit the use of private and commercial interstate carriers to further fraudulent activity in the same way such use of the United States mail had long been prohibited"—*i.e.*, for both intrastate and interstate deliveries. Pet. App. 27a.

Petitioners also contend (Pet. 9-10) that because the wire fraud statute, 18 U.S.C. 1343, requires an interstate transmission, the mail fraud statute should likewise be construed to apply only to the interstate deliveries of private or commercial carriers. As the court of appeals recognized, however, petitioners' argument fails to account for the "significant textual differences" between the two statutes. Pet. App. 33a n.3. "[T]he language of the wire fraud statute requires that a communication actually travel 'in interstate or foreign commerce,' whereas the language of the mail fraud statute requires only that a mailing be deposited with an 'interstate carrier.'" *Ibid.*[3]

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[3] Citing *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987), petitioners assert (Pet. 10) that this Court has previously held that the wire fraud statute and the mail fraud statute should be given

Petitioners cite no decision, and we are aware of none, that has construed Section 1341 to be inapplicable to intrastate deliveries by private or commercial interstate carriers. Absent a conflict in authority, petitioners' statutory claim does not warrant this Court's review.

2. Petitioners contend (Pet. 11-15) that if Section 1341 is construed to cover the intrastate use of private or commercial interstate carriers, it exceeds Congress's authority under the Commerce Clause. That claim lacks merit.

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activities; and (3) activities that substantially affect interstate commerce. *Id.* at 558-559. Application of the mail fraud statute to the intrastate use of private and commercial interstate carriers is a permissible exercise of congressional authority under the second *Lopez* category, as a regulation and protection of the instrumentalities of interstate commerce.

In the present case, petitioners sent false invoices by UPS from PDS's Virginia headquarters to the Virginia offices of its prime contractors. Petitioners do not

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similar construction. In *Carpenter*, this Court held that, because the mail and wire fraud statutes "share the same language" with respect to the "scheme to defraud" element, the Court would apply "the same analysis" to that element of both statutes. 484 U.S. at 25 n.6. In *Neder* v. *United States*, 527 U.S. 1 (1999), however, the Court noted that the mail and wire fraud statutes contain "different jurisdictional elements." *Id.* at 20.

dispute that UPS is an instrumentality of interstate commerce. See Pet. 13; Pet. App. 29a; *United States* v. *Griffith*, 85 F.3d 284, 286-288 (7th Cir.) (Federal Express deliveries were deliveries by an instrumentality in interstate commerce), cert. denied, 519 U.S. 909 (1996). Congress is therefore authorized to prohibit the use in fraudulent activity of UPS facilities and services, even though a particular threat may come only from an intrastate activity. As the court of appeals correctly held, "when Congress acts to regulate or protect an instrumentality of interstate commerce under the second *Lopez* category, federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement, and federal jurisdiction based on *intra* state use of *inter* state facilities is an appropriate exercise of the commerce power." Pet. App. 30a (internal quotation marks omitted).

While acknowledging that Congress has power to regulate instrumentalities of interstate commerce and to protect them from direct harm, petitioners contend that Congress is not authorized to prevent the misuse of those instrumentalities in furtherance of crimes such as fraud. Pet. 12. Petitioners observe that the examples of the second category of Commerce Clause legislation cited in *Lopez* (see 514 U.S. at 558)—*Shreveport Rate Cases*, 234 U.S. 342 (1914), *Southern Railway* v. *United States*, 222 U.S. 20 (1911), and *Perez* v. *United States*, 402 U.S. 146 (1971)—involved either direct regulation of an instrumentality of interstate commerce or an effort to protect the instrumentality from direct harm. In listing such examples, however, the *Lopez* Court did not purport to define the outer boundaries of congressional authority under the second category of valid Commerce Clause legislation.

Several courts of appeals have relied on Congress's power to protect instrumentalities of interstate commerce in upholding convictions of defendants who misused different instrumentalities, even where the misuse did not directly harm the instrumentality. In *United States* v. *Marek*, 238 F.3d 310 (en banc), cert. denied, 122 S. Ct. 37 (2001), the Fifth Circuit upheld a conviction under the federal murder-for-hire statute, 18 U.S.C. 1958, based on the defendant's intrastate use of Western Union to transfer payment to a hit man. The court explained that the statute as applied was valid "because intrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power." 238 F.3d at 318. In *United States* v. *Baker*, 82 F.3d 273, cert. denied, 519 U.S. 1020 (1996), the Eighth Circuit affirmed a conviction under the Travel Act, 18 U.S.C. 1952(a), based upon the intrastate use of an automated teller machine (ATM) that was part of an interstate network of such machines. Although the crime caused no direct harm to the ATM network, as the defendant simply caused his extortion victim to use the network to withdraw cash, the Eighth Circuit sustained the conviction under the second *Lopez* category, because the ATM machine was a facility in interstate commerce. 82 F.3d at 275-276. In *United States* v. *Gilbert*, 181 F.3d 152 (1st Cir. 1999), a defendant was convicted of using a telephone to make a bomb threat in violation of 18 U.S.C. 844(e). Although there was no evidence that the telephone call was made interstate or caused direct harm to the telephone system, the First Circuit upheld the conviction against a Commerce Clause challenge. 181 F.3d at 157-159. The court stated that "a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce." *Id.* at

158. See *United States* v. *Clayton*, 108 F.3d 1114, 1116-1117 (9th Cir.) (holding that cellular telephone identification numbers are instrumentalities of interstate commerce and that the misuse of those numbers to clone cellular telephones was properly made a federal crime under Congress's power to protect the instrumentalities of interstate commerce), cert. denied, 522 U.S. 893 (1997). Petitioners identify no contrary authority.[4]

3. Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioners contend (Pet. 15-23) that their sentences were unlawfully imposed because the district court rather than the jury made the loss amount findings that were used to calculate petitioners' Guidelines sentencing ranges. In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Petitioners argue that the district court's computation of the Guidelines sentencing range must likewise be based

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[4] Application of Section 1341 to petitioners' conduct may also be sustained under the third category of permissible Commerce Clause legislation described in *Lopez*, as regulation of an activity substantially affecting interstate commerce. See *Lopez*, 514 U.S. at 558-560. In her concurring opinion, Judge Williams had "no difficulty concluding that the furtherance of schemes devised for the purpose of defrauding others can be viewed as economic activity within the meaning of *Lopez* and [*United States* v. *Morrison*, 529 U.S. 598 (2000)]." Pet. App. 51a. Judge Williams further explained that "in the aggregate, the intrastate use of interstate carriers to further fraudulent schemes has a substantial harmful effect on interstate commerce." *Ibid.*

solely on facts alleged in the indictment and found by the jury beyond a reasonable doubt.

a. Petitioners contend (Pet. 16-18) that this Court should grant review to consider the continuing vitality of *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), in light of the Court's subsequent decision in *Apprendi*. In *McMillan*, this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. *Id.* at 87-88. In the present case, by contrast, the district court's loss amount findings did not trigger the application of any statutory minimum sentence. Petitioners were simply sentenced within the statutory ranges for the offenses of conviction based upon the application of the Sentencing Guidelines. Because this case does not involve the imposition of a statutory minimum sentence, there is no need to hold the petition pending this Court's decision in *Harris* v. *United States*, cert. granted, 122 S. Ct. 663 (2001), in which this Court granted review on the following question: "Given that a finding of 'brandishing,' as used in 18 U.S.C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of 'brandishing' be alleged in the indictment and proved beyond a reasonable doubt?"

b. The court of appeals correctly rejected petitioners' contention that *Apprendi* requires jury findings with respect to all facts that may increase a defendant's Guidelines sentencing range. See Pet. App. 45a-46a. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so

long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513, 514 (1998) (Guidelines "instruct *the judge* * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"). *Apprendi* did not hold otherwise. See *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Sentencing Guidelines simply "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 402 (1995); see *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court retains the authority to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because the Guidelines cannot increase the statutory maximum penalty for a criminal offense, see Guidelines § 5G1.1; *Edwards*, 523

U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"), *Apprendi* does not support a challenge to the constitutionality of the Guidelines.

Petitioners also suggest that proof of relevant conduct by a higher standard than preponderance of the evidence is required before a sentencing court may use that conduct to impose a sentence "within the statutory maximum, but disproportionate to the sentence warranted based on the facts alleged in the indictment and proven at trial." Pet. 22; see Pet. 21-23. As the Court noted in *Watts*, there is "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be [proved by] clear and convincing evidence." 519 U.S. at 156 & n.2 (collecting cases); see *United States* v. *Kikumura*, 918 F.2d 1084, 1100-1102 (3d Cir. 1990). This case, however, is not an appropriate vehicle for resolving any disagreement among the circuits on that issue.

This case does not involve "extreme circumstances" in which relevant conduct findings made by the judge at sentencing "dramatically" increase the defendant's punishment. Petitioners contend that "[t]he total amount of loss associated with the convicted counts was $19,008." Pet. 3; see Pet. App. 43a; but see note 2, *supra*. If the district court had used that loss amount in applying the Guidelines, petitioners' total offense level would have been 11 rather than 17, see Pet. 4 n.1; Guidelines § 2F1.1(b)(1)(D) (1998); pp. 4-5, *supra*, and petitioner Webb would have been subject to a Guidelines range of 8-14 months' imprisonment. Instead, Webb was sentenced to 24 months' imprisonment. The court of appeals correctly concluded that the effect of the district court's loss findings was not "so great or

disproportionate as to * * * implicate due process concerns." Pet. App. 46a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2002